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Error to Circuit Court, Nelson County.

Action by J. W. Jordan against A. S. White & Co., Incorporated. Judgment for plaintiff, and defendant brings error. Affirmed.

Caskie & Caskie, of Lynchburg, for plaintiff in error.

S. B. Whitehead, of Lovingsston, for defendant in error.

WASHINGTON-SOUTHERN RY. CO. *v.* GRIMES' ADM'R.

Jan. 16, 1919.

[98 S. E. 30.]

1. Trial (§ 253 (4)*)—Instructions—Omission of Defendant's Theory.—In an action for the death of plaintiff's decedent in a collision between the automobile wherein she was driving with her husband and defendant's engine at a public crossing, an instruction, directing a verdict for plaintiff if "defendant was guilty of any negligence alleged in plaintiff's declaration," was erroneous as omitting defendant's theory that decedent was guilty of contributory negligence.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 737.]

2. Trial (§ 296 (4, 5)*)—Instructions—Cure of Error—Contradictory Instructions.—Where an instruction directing verdict for plaintiff is erroneous as omitting defendant's theory of the defense of contributory negligence, the error cannot be cured by other instructions, since it cannot be said whether the jury was controlled by one instruction or the other.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 745.]

Error to Circuit Court, Fairfax County.

Action by Caroline H. Grimes' administrator against the Washington-Southern Railway Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

Moore, Keith, McCandlish & Hall, of Fairfax, and *Eppa Hunton, Jr.*, of Richmond, for plaintiff in error.

C. V. Ford, of Fairfax, *Nicol & Son*, of Alexandria, for defendant in error.

SOUTHERN RY. CO. *v.* ABEE'S ADM'R.

Jan. 16, 1919.

[98 S. E. 31.]

1. Railroads (§ 312 (7)*)—Warning Signals—Statutes—"Highway Crossing."—A railroad crossing on extension of an alley from a street to a factory gate, recognized by the railway by the erection of a whistle post, held a "highway crossing" within Code 1904, §

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

1294d, subd. 24, requiring engines to give warning signals on approaching highway crossings.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 128, 132; 17 Va.-W. Va. Enc. Dig. 249.]

2. Railroads (§ 312 (1)*)—Highway Crossings—Negligence.—It is negligence for a railway company to run an engine at a high rate of speed without lights or warning over a highway crossing used by large numbers of persons.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 128.]

3. Railroads (§ 330 (3)*)—Highway Crossings—Lights and Signals.—One who crosses a railroad track at a highway crossing after waiting for a train to pass may assume that any engine or train approaching on the adjacent track will carry lights and give proper signals.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 138, 139.]

4. Railroads (§ 346 (5)*)—Crossing Accidents—Presumption of Exercise of Ordinary Care.—It will be presumed, in the absence of proof to the contrary, that one killed by a railroad engine at a highway crossing was in the exercise of ordinary care.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 139, 143.]

5. Railroads (§ 346 (5)*)—Crossing Accidents—Contributory Negligence—Burden of Proof.—Where plaintiff's decedent was struck by a locomotive at a highway crossing, the burden of showing contributory negligence was on defendant, unless it was disclosed by plaintiff's own evidence, or fairly inferable from all the facts.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 142, 143.]

6. Railroads (§§ 312 (4), 320*)—Crossing Accidents—Duty to Maintain Lookout.—It is the duty of railroad employees running an engine and tender to exercise ordinary care and diligence in keeping a lookout to avoid persons crossing the tracks at a highway crossing, and to warn them of approaching danger.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 129.]

7. Trial (§ 296 (3)*)—Instructions.—Where decedent was killed by defendant's locomotive backing across a highway crossing, an instruction that defendant owed the duty of maintaining a lookout was not erroneous as leading jury to believe that a lookout in the rear of the tender should have been maintained, in view of instructions to disregard stricken evidence as to such lookout.

[Ed. Note.—For other cases, see 17 Va.-W. Va. Enc. Dig. 259-261.]

8. Trial (§ 253 (7)*)—Instructions.—Where plaintiff's decedent was killed by a backing engine at a highway crossing, an instruction held not erroneous as directing a verdict on a partial view of the evidence.

[Ed. Note.—For other cases, see 17 Va.-W. Va. Enc. Dig. 259-261.]

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

Error to. Circuit Court, Pittsylvania County.

Action by Loyd Abee's administrator against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Leigh & Leigh, of Danville, for plaintiff in error.

B. H. Custer, of Danville, for defendant in error.

PAYNE *v.* BUENA VISTA EXTRACT CO.

Jan. 16, 1919.

[98 S. E. 34.]

1. Quieting Title (§ 23*)—Cloud on Title—Possession and Legal Seisin.—Prior to Pollard's Code 1904, § 2726, one could not maintain bill quia timet to remove cloud on title, unless having the legal title and the actual possession; and under such section he could not do so unless having the legal seisin, undisturbed by the possession of another, unless for some special reason the remedy by ejectment was inadequate.

[Ed. Note.—For other cases, see 11 Va.-W. Va. Enc. Dig. 519.]

2. Estoppel (§ 8 (2)*)—Position in Judicial Proceeding—Quieting Title.—Maintenance of suit quia timet to remove cloud on title could not be justified on the theory that plaintiff's legal seisin was undisturbed, notwithstanding defendant's actual possession, because of defendant's claim to be a vendee of plaintiff's grantor, and the rule that the entry and possession of a vendee is tolled against his vendor and those in privity of estate with the vendor; plaintiff having throughout the litigation denied existence of any contract of sale to defendant.

3. Quieting Title (§ 23*)—Cloud on Title—Possession—White Act.—Bill quia timet to remove cloud on title can, under the White Act, amending Pollard's Code 1904, § 3058, be maintained, though plaintiff be not in possession, if otherwise it could be maintained.

[Ed. Note.—For other cases, see 11 Va.-W. Va. Enc. Dig. 519.]

4. Quieting Title (§ 19*)—Cloud on Title—Exercise of Jurisdiction—Discretion.—Exercise of jurisdiction to remove cloud on title by bill quia timet is discretionary, where plaintiff has legal title and actual possession, only when there is doubt whether there is such a cloud that injury may reasonably be apprehended therefrom.

[Ed. Note.—For other cases, see 11 Va.-W. Va. Enc. Dig. 512-513.]

5. Constitutional Law (§ 70 (3)*)—Judicial Functions—Policy of Law.—The Legislature having power to authorize bill quia timet to remove cloud on title, though defendant be in possession, the argument of policy against a law so doing cannot avail with the court.

6. Judgment (§ 570 (12)*)—"Discontinuance"—Effect.—Under

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.